BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief should be read in connection with the brief submitted by Wisconsin Public Service Corporation in support of its petition for a writ of certiorari for a review of the same judgment of the Circuit Court of Appeals for the Seventh Circuit.

We believe it unnecessary to duplicate in this brief the comprehensive statement of facts and evidence proper for the consideration of the court in passing upon the petition of the State of Wisconsin for a writ as herein made. Reference is respectfully made to such statement of facts and evidence and the court is requested to consider the same as having been incorporated in this brief.

SPECIFICATIONS OF ERRORS

The errors which this petitioner will urge, if its petition for certiorari is granted, are that the United States Circuit Court for the Seventh Circuit erred:

1. In holding that the waters of the Wisconsin River at and in the vicinity of Tomahawk are navigable so as to be subject to the jurisdiction of the federal government under the Commerce Clause of the United States Constitution.

2. In holding that the Federal Power Act vests in the Federal Power Commission the power and authority to require an application to said Commission for the construction and maintenance of the Tomahawk Dam.

ARGUMENT

POINT I

THE WISCONSIN RIVER AT THE TOMAHAWK DAM IS NOT NAVIGABLE IN THE FEDERAL SENSE

We maintain that the Circuit Court of Appeals was in error in holding that the Wisconsin River at Tomahawk is now, or ever was, navigable in the sense that it was used or susceptible of use in the conduct of interstate commerce. We contend that such holding is in conflict with the following cases cited in the opinion of the court:

North American Dredging Co. vs. *Mintzer,* 245 Fed. 297.

United States vs. *Rio Grande Irrigation Co.,* 174 U. S. 690.

Leovy vs. *United States,* 177 U. S. 621.

Oklahoma vs. *Texas,* 258 U. S. 574.

Brewer-Elliott Oil & Gas Co. vs. *United States,* 260 U. S. 77.

The record in this case is clear to the effect that the only commercial use that was ever made of the Wisconsin River at or anywhere near the vicinity of the Tomahawk Dam was for the flotation of logs down that stream for one or two short seasons in each year for a number of years ending in 1907. As was said by one of the Judges of the Court of Appeals during the course of the oral argument before that court: "Everyone knows that the Wisconsin River at Tomahawk is valueless for navigation or

commercial purposes and is good only for the development of power."

We contend that under the doctrine of *United States* vs. *Appalachian Power Company*, 311 U. S. 377, the navigability of the Wisconsin River at Tomahawk is not properly "determined by a formula;" that the formula or adage, "once navigable, always navigable," adopted in *Economy Light & Power Co.* vs. *United States*, 256 U. S. 113, is not applicable, under the facts shown by the record in this case, to the waters of the Wisconsin River at and in the vicinity of Tomahawk; that this adage or formula constitutes, at the most, a presumption that the former use of a stream or other water for navigation thereof results in a conclusion of fact that such water is still suitable for use for such navigation, even though such use may have ceased for a great number of years; but that this presumption is nevertheless subject to rebuttal and is completely rebutted by evidence in this case, which shows clearly and conclusively that the water has not only ceased to be so used but is no longer susceptible of that use.

Accordingly, we maintain that while the term "navigability" in the federal sense thereof is a legal concept, nevertheless as was indicated in *United States* vs. *Appalachian Power Company, supra*, the determination of whether any particular stream of water is or is not navigable, in the same sense, is essentially and primarily a question of fact to be determined upon evidence in accordance with the approved definition of such legal concept of navigability. All agree that such legal concept was correctly defined in *The Daniel Ball* case, 77 U. S. 557, as meaning "used or . . . susceptible of being used, in their ordinary condition as highways for commerce." And we maintain

that under the evidence as presented in the record in this case and in accordance with the definition as laid down in *The Daniel Ball* case, *supra,* the Wisconsin River is not now a navigable stream of the United States or subject to federal jurisdiction as such. In other words, we maintain that the doctrine "once navigable, always navigable" may have been properly applicable to facts such as those presented in *Economy Light & Power Co.* vs. *United States, supra,* but is not applicable to the facts clearly demonstrated by the evidence in the record in this case.

We do not concede that the trial court was correct in holding that the flotation of logs, between the source of the Wisconsin River and a point in that river at Whitney Rapids below Tomahawk, constituted an operation in interstate commerce because the logs were there manufactured into lumber and that lumber was transported beyond the boundaries of Wisconsin. But even if that holding be correct, the fact that either such logs or such lumber was a subject of interstate commerce does not establish that the flotation of the logs in the river above Whitney Rapids amounted to a navigation of that portion of the Wisconsin River within any federal or constitutional definition of the term "navigation."

It is practically conceded that unless the Wisconsin River at or in the vicinity of Tomahawk is navigable within such constitutional definition, the order under review in this case is beyond the powers vested in the respondent Commission. We therefore submit that this court should consider and determine the question of navigability as thus raised.

POINT II

UNDER THE TERMS OF THE FEDERAL POWER ACT THE RESPONDENT COMMISSION IS WITHOUT AUTHORITY TO REQUIRE A LICENSE FOR THE TOMAHAWK DAM

Even if it be held that the Wisconsin River in its entirety is navigable in the constitutional sense, it does not follow that Congress must have given authority to the respondent Commission to exercise any specific power with respect to any particular portion of that water. The respondent Commission has only the power vested by the Federal Power Act.

The Federal Power Act prescribed a different definition for the term "navigable waters" than that which had been laid down by this court in *The Daniel Ball* case, *supra*. Under the definition in the case just cited waters are navigable if they are either used or *susceptible* of use in the conduct of interstate or foreign commerce. Under the definition in the Federal Power Act, a water to be navigable must be either used or *suitable* for use. (Federal Power Act, Part I, Section 3(8)) Thus there is a clear distinction between "navigable waters," over which Congress has power under the Commerce Clause of the United States Constitution, and "navigable waters" as defined in the Federal Power Act.

The provisions of Section 23(b) of the Federal Power Act require that a license be applied for and issued by the respondent Commission for all power dams constructed, operated or maintained in "navigable waters" as defined in that Act; but also provides that a license is thus required for any such dam constructed in waters "other than

those herein defined as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states" *only* in case the respondent Commission shall make a valid finding that "the interests of interstate or foreign commerce would be affected" by such dams.

Even if the waters of the Wisconsin River at Tomahawk could be held to be navigable in the constitutional sense of *The Daniel Ball* definition, we maintain that those waters cannot possibly be held to be navigable within the definition of that term in the Federal Power Act; that those waters are such that the Federal Power Act does not *in terms* require a federal license for a dam constructed or maintained therein; and that a license for a dam in such waters can only be required by the Commission upon a valid finding that the dam in some way affects interstate or foreign commerce.

As we read the opinion of the Circuit Court of Appeals, that court holds that the mere fact that a dam is in a water which is navigable in the constitutional sense, is sufficient to justify a requirement of the respondent Commission that an application be made to it for a license for the construction and maintenance of said dam. We maintain that this is palpable error; that the Wisconsin River is clearly not navigable within the definition of the term "navigable waters" in the Federal Power Act; that in arriving at its decision in this case the Circuit Court of Appeals should therefore have considered and determined the question of whether the evidence before the respondent Commission was sufficient to establish that the construction and maintenance of the Tomahawk Dam would actually affect interstate or foreign commerce; that the Circuit Court of Ap-

peals gave no consideration to that question; and that the decision of the Circuit Court of Appeals was therefore arrived at upon the basis of a misconception of the provisions of the Federal Power Act and of the powers thereby vested in the respondent Commission.

We contend that the facts in this case show that the Wisconsin River, even if it be navigable in the constitutional sense, is not a navigable water as defined in the Federal Power Act; that the requirement of a license for the Tomahawk Dam had to be predicated therefore upon a valid finding that the Dam would affect foreign or interstate commerce; that the evidence before the respondent Commission is admittedly inadequate to sustain any such finding; and that the judgment approving that said order is therefor erroneous.

We contend, therefore, that it was incompetent for the respondent Commission to enter an order requiring the Wisconsin Public Service Corporation to apply for a license for the construction and maintenance of the Tomahawk Dam except upon the valid finding that such construction and maintenance of that dam would affect interstate or foreign commerce. As before stated, the record is completely and wholly devoid of evidence upon which the respondent Commission could reasonably conclude that the construction or maintenance of that dam affects or would by any possibility ever affect any interstate commerce whatsoever.

We submit, therefore, that the order requiring that license was invalid; that the Circuit Court of Appeals arrived at its judgment affirming that order upon the basis of a misconstruction or misunderstanding of the extent of the power vested in the respondent Commission by the

Federal Power Act; and th[at this court should review the
decision and judgment th[us made, to the end that the
extent of the power vested [in the respondent Commission
may be definitively deter[mined and authoritatively pro-
nounced.

PO[INT III

IMPORTANT RIGH[TS OF THE STATE ARE
INV[OLVED

The waters of the Wis[consin River are public waters—
regardless of whether they[are navigable in any sense or
under any definition. The[State of Wisconsin is clearly
vested with the sovereign[power of regulating the use,
level and flow of such wat[ers for the benefit of the public
and the protection of pub[lic rights therein—subject only
to the superior right, if a[ny, of the United States under
the Commerce Clause of [the Federal Constitution.

The order here invol[ved required the owner of the
Tomahawk Dam to apply [for a license. Under the provi-
sions of the Federal Powe[r Act that license must contain
a so-called recapture clau[se which, in reality, is an option
for the purchase of the Da[m by the United States at a fixed
or determinable price. S[hould such option be exercised
the right of the state to r[egulate the maintenance and op-
eration of the dam, and l[ikewise all revenues to the state
from taxation of the dam [and appurtenant property would
cease. Likewise the asse[rtion by respondent Commission
of authority over the op[eration and maintenance of the
dam results either in sup[erseding all right of the state to
provide such regulation, [or else in a concurrent power of

regulation between the state and the United States with respect to the same matters.

In either case, the power and authority of the state is curtailed. If such curtailment is unlawful, then the sovereign rights of the state are infringed and impaired.

We maintain that the assertion by the respondent Commission of any authority or jurisdiction whatsoever over the Tomahawk Dam is an unlawful attempt to impair such sovereign rights of the State of Wisconsin; and we submit, therefore, that this court should grant the state's petition for review of a judgment which upholds the validity of that assumption of power.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of Wisconsin,

H. T. FERGUSON,
Assistant Attorney General of Wisconsin,

Counsel for Petitioner.